No. 6533

United States Circuit Court of Appeals
For the Ninth Circuit

ARNIE JENSEN and CHRISTIAN JENSEN,
Appellants,

vs.

T. J. SPARKES, Trustee in Bankruptcy of O. STANLEY DRESHER, Bankrupt,
Appellee.

BRIEF OF APPELLEE.

Upon Appeal From the United States District Court for the District of Arizona.

WALTER J. THALHEIMER,
Attorney for Appellee.

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STATEMENT OF THE CASE.

The facts involved are fully set forth in the agreed statement of the case (Tr. Record, p. 3-7) and are substantially as stated in the brief of the appellants.

An additional fact, not given in appellants' brief, to which the appellee believes it desirable to call attention is that the appellee was appointed trustee in bankruptcy of O. Stanley Dresher, bankrupt, on August 21, 1930 (Trans. Record, p. 4) one month and three days prior to the abandonment of the lease and vacating of the premises, namely, September 24, 1930, (Trans. Record, p. 5).

POINTS AND AUTHORITIES.

I.

It was unnecessary for the lease to contain an express statement that the Fifteen Hundred Dollars paid by the bankrupt at the time of the execution of the lease was an advancement to secure the faithful performance of the lease.

Cunningham vs. Stockton, 81 Kas. 780, 106 Pac. 1057, 19 Ann. Cas. 212;

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669;

Redmond vs. Graham (Calif. 1931), 295 Pac. 1031;

Manchester Marble Co. vs. Rutledge R. Co., 100 Vt. 232, 136 Atl. 394, 51 A. L. R. 628;

16 Ruling Case Law 698-700;

16 Ruling Case Law 931.

II.

On the termination of the lease the trustee of the bankrupt was entitled to the return of the advancement deposited by the bankrupt as security together with accumulated interest, less so much thereof as re-

quired to make good the rent due at the time of bankruptcy and a reasonable rent during the occupancy of the premises by the trustee.

In Re Sherwoods Inc., 210 Fed. 754 Ann. Cas. 1916 A, p. 940;
In Re Sun Drug Co., 4 Fed. (2d) 843;
In Re Tanory, 270 Fed. 872;
In Re Frey, 26 Fed. (2d) 472;
Carstens vs. McLean, 7 Fed. (2d) 322;
Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549;
Cunningham vs. Stockton, 81 Kas. 780, 106 Pac. 1057, 19 Ann. Cas. 212;
Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669;
In Re Millard's Inc., 41 Fed. (2d) 498;
In Re Yodleman-Walsh Foundry Co., 166 Fed. 381.

III.

The entry into possession of the premises by the lessors and leasing them to another operated as a surrender and acceptance and terminated the lease.

In Re Frey, 26 Fed. (2d) 472;
In Re Sherwoods Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940;
Welcome vs. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. S. R. 145;
Willis vs. Kranendonk, 58 Utah 592, 200 Pac. 1025, 18 A. L. R. 947;
Kastner vs. Campbell, 6 Ariz. 145, 53 Pac. 586;
Note: 18 A. L. R. 960;
Electric Appliance Co. vs. Ellis, 4 Fed. (2d) 108.

IV.

The lien of the lessor created by the statute of Arizona, if effective at all against the Fifteen Hundred Dollars deposited as security, is only to the extent of rentals due and unpaid prior to the lessee's bankruptcy.

Sec. 1958 Revised Code of Arizona, 1928.

ARGUMENT.

I.

It was unnecessary for the lease to contain an express statement that the Fifteen Hundred Dollars paid by the bankrupt at the time of the execution of the lease was an advancement to secure the faithful performance of the lease.

The manifest meaning and intent of the parties was that title to the Fifteen Hundred Dollars remained in the bankrupt, that the same was deposited with the lessor to be held in trust as security until the last eight and four-sevenths months of the leasehold term and was then to be applied as "earned and absorbed" on the payment of the rent accruing in and during such last eight and four-sevenths months.

> "The lease did not contain an express statement that the money advanced should constitute a deposit to insure performance by appellee, but the advancement of so large an amount, the payment of the same before the construction of the building was be-

gun, and about six months before possession could be obtained, and the provision that the amount advanced should be applied on the rental for the last year of the term, clearly indicate that it was a deposit to insure performance."

Cunningham vs. Stockton, 81 Kans. 780, 106 Pac. 1057, 19 Ann. Cas. 212.

The payment of interest on the advancement is in itself inconsistent with the contention that title passed to the lessor. As is said by the Court in Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669:

"The lease is for a period of ten years, the interest alone would be $600.00 per annum, and, upon the theory that the $10,000 was an actual payment to the defendants at the time of the execution of the lease, the defendants would then be paying plaintiff $600 per annum as interest for the use of their own money. As we understand it, a deposit is made when one person gives to another with his consent the possession of personal property to keep for the use and benefit of the first or a third party.

Under the record we construe the lease to mean that the $10,000 was a deposit with the lessors; that the title to the money remained in the lessees, subject to the terms and conditions of the lease; and that it was not an actual payment to the lessors at the time of the execution of the lease."

"This is in no sense an advance payment of the rent for that period. Until the end of the term, the

money is held as security; and until that time it is uncertain whether the money shall be applied on rent. This interpretation is strengthened by the further provision that the $5400 should be returned to the lessee upon the accidental destruction of the premises. This is, of course, wholly inconsistent with an absolute payment in advance, with title passing to the lessor."

Redmond vs. Graham, (Calif. 1931), 295 Pac. 1031.

In construing the lease the construction favorable to the lessee should be adopted.

"The construction contended for by the defendant would do violence to the rule that a deed or lease will be most strongly construed against the grantor or lessor. (Citations.) It would likewise be against the rule that a contract should be strictly construed against the party who framed and wrote it."

Manchester Marble Co. vs. Rutland R. Co., 100 Vt. 232, 136 Atl. 394, 51 A. L. R. 628;

16 Ruling Case Law 698-700;

16 Ruling Case Law 931.

II.

On the termination of the lease the trustee of the bankrupt was entitled to the return of the advancement deposited by the bankrupt as security together with accumulated interest, less so much thereof as required to make good the rent due at the time of bankruptcy and a reasonable rent during the occupancy of the premises by the trustee.

"The right of the lessee in the money which he had deposited with the lessor was to receive back with accumulated interest from the lessor upon the termination of the lease so much of the deposit as was not needed to make good defaults upon the covenants, and upon the bankruptcy of the lessee, this right passed to the trustee."

In Re Sherwoods, Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940.

"If the $5000 paid by the lessee at the time of executing the lease was a mere advancement to secure the faithful performance of the covenants of the lease, the lessee or his successor in interest was entitled to a return of the money thus advanced, upon the determination of the lease, less the amount of any rent due and unpaid at the time of such determination."

In Re Sun Drug Company, 4 Fed. (2d) 843;

In Re Tanory, 270 Fed. 872;

In Re Frey, 26 Fed. (2d) 472;

Carstens vs. McLean, 7 Fed. (2d) 322;

Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549;

Cunningham vs. Stockton, 81 Kans. 780, 106 Pac. 1057, 19 Ann. Cas. 212;

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669.

The rent for which the trustee is liable for use and occupancy of the premises is a reasonable amount.

"It is well settled that upon the bankruptcy of the tenant, provided this does not by the express terms

of the lease terminate the tenancy, the leasehold interest passes to the trustee in bankruptcy if he elects to accept it. He has a reasonable time within which the lease may be accepted. If in the meanwhile he occupies the premises, he is liable for merely the reasonable rent while so occupying, and not for the rent stipulated in the lease itself."

In Re Sherwoods, Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940;

In Re Millards Inc., 41 Fed. (2d) 498;

In Re Yodleman-Walsh Foundry Co., 166 Fed. 381.

The lease in re Sun Drug Company (supra), also cited by appellants as sustaining their position, provided:

"Now, therefore, in consideration of the sum of $5,000 in cash and the promissory note of the lessee in favor of the lessor due April 15, 1923, in the sum of $1600 the receipt of said cash and note being hereby acknowledged by the lessor, and IN FURTHER CONSIDERATION OF THE RENTALS HEREIN RESERVED * * *."

It will be observed that the money paid and the note given were specifically in consideration of the execution of the lease and that no element of deposit as security was concerned; as the Court said:

"The contract by its terms leaves no room for construction. The money was not to be applied on rents to accrue in the future or for any other purpose, and not to be returned to the lessee in any event or upon any contingency. The payment was as absolute and

as unconditional as if made for any other interest in the premises and the money when paid became the absolute property of the lessor free from any claim on the part of the lessee or the trustee in bankruptcy."

The case of Galbraith vs. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, cited by appellants as supporting their contentions, concerned an advance payment of rental solely and contained nothing in pleading or evidence relative to any deposit for security and as the Court said:

"While the $20,000 may be in fact have been paid as security, as it may in fact have been paid as a consideration to remove an obstacle that arose in the negotiations for the lease, on the pleadings and evidence we must and do hold that it was what the pleadings and evidence call it, an advance payment of rent."

In Casino Amusement Company vs. Ocean Beach Amusement Company, 133 S. 559, the Court itself points out that it is to be distinguished from Cunningham vs. Stockton and like cases, saying:

"The general rule deducible from the authorities is that, in the absence of provision therefor, rents paid in advance cannot be recovered by the tenant upon termination of the lease, unless such termination was wrongful against him. (Citations.) In this respect there is a difference between an advance payment of rent and a mere deposit or security for performance such as were involved in Cunningham vs.

Stockton, supra, and other authorities cited by plaintiff in error."

Harvey vs. Weisbaum, 159 Cal. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540, cited by appellants, was solely an action to recover an advance payment of rent because of destruction of the premises by fire. As the Court said:

> "The question and the only question that need be decided, is as to whether or not a tenant, who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, can, in the absence of any covenant in the lease, recover the rent so paid in case of the total destruction of the premises by fire without any fault of either party to the lease."

In Wetzler vs. Patterson, 73 Cal. Ap. 527, 238 Pac. 1077, another citation of appellants, the Court points out that the character of the payment is dependent on the intention of the parties and in deciding that the intention was that the payment there involved was an advance payment of rent, says:

> "There is no reason why the lessors could not or should not credit this sum of $700 upon the rentals for the last three months immediately upon their receipt of the $933.33 i. e., immediately upon the execution of the lease. And it doubtless was the intention of the parties that the money should be so immediately credited by the lessors upon its receipt by them. No where in the instrument is any provision made for the repayment to the lessee of the $700, or for

the repayment of any part of the $933.33 which the latter undertook to pay upon the execution of the lease. No provision is made for its repayment at any time or upon any contingency. On the contrary, the language of this part of the lease clearly implies that all of the $933.33, including the $700 in question, was to belong absolutely to the lessors from the moment of its receipt by them. For these reasons we think it clear that the covenant which we are now analyzing, the one found in the first part of the lease, provides for and contemplates the payment of money, and not the deposit of security. That is to say, it is a covenant by the lessee for the immediate partial performance by him of his contract to pay rent by making immediately an advance payment of the rent for the last three months of the term."

Foye vs. Simpkinson, 89 Cal. Ap. 119, 264 Pac. 331, and Pigg vs. Kelley, 92 Cal. Ap. 329, 268 Pac. 463, other citations of appellants, also involved leases where the payments were clearly advance payments of rent and not capable of being construed otherwise.

The appellants' contention that a different rule has been adopted in Oregon than that expressed in Moumal vs. Parkhurst (supra) does not seem to be borne out by Sinclair vs. Burke, 133 Ore. 115, 287 Pac. 686 and Phegley vs. Enke's City Dye Works, 127 Ore. 539, 272 Pac. 898 (cited by appellants). In Sinclair vs. Burke (supra) no element of deposit was involved, the Court saying, as also shown in appellants' brief:

"That sum was paid by plaintiff to defendants pursuant to his covenant in the lease to do so, which

> money was to be applied on the last six months' rent. The money thereby became the absolute property of defendants. It was simply an absolute payment of rent in advance, as stipulated by plaintiff in the lease. It was not a deposit as security for the performance of the agreement. The statement in plaintiff's brief in regard to the $1200 'to apply on the last six months' rental, when the same shall become due and collectible' contained the words which we have underscored, that are not found in the stipulation of plaintiff in the lease."

and in Phegley vs. Enke's City Dye Works (supra) the Court said:

> "That the money was not deposited as security for the payment by defendant of the rent is also clear. If it had been, defendant would be entitled to a return of the sum deposited, less the amount of rent due and unpaid at the time of the termination of the lease."

In Evans vs. McClure, 108 Ark. 531, 158 S. W. 487, cited by appellants, the Court pointed out that the facts involved were essentially different from those in Cunningham vs. Stockton (supra) and stated, as set forth in appellants' brief:

> "By the express terms of the contract the $900 paid by the original lessee to the lessor was, as we have already seen, simply a payment in advance of rent, and the contract, not containing any provision that it should be paid back, it is not recoverable by the defendants."

III.

The entry into possession of the premises by the lessors and leasing them to another operated as a surrender and acceptance and terminated the lease.

The acceptance by the landlord of a surrender by the tenant's trustee terminated the lease.

In Re Frey, 26 Fed. (2d) 472.

> "The making of the new lease by the lessor during the existence of an outstanding lease, the tenant under the original lease giving up his possession to the stranger, operates as a surrender by operation of law. (Citations.)."

In Re Sherwoods' Inc., 210 Fed. 754, Ann. Cas. 1916 A, p. 940.

It will be noted that the trustee vacated the premises and that the appellants took possession without any qualification that it was for the benefit of the estate and that the leasing of the same to another for a longer period than the remainder of the Dresher lease was appellants independent act. As is said in Welcome vs. Hess, 90 Cal. 507, 27 Pac. 369, 25 Am. S. R. 145;

> "In taking possession, the landlord did not announce his intention to continue to hold the tenants. He relet without notifying the defendants that he should do so on their account. He relet for a period longer than the remainder of their term, thus showing plainly that he was acting in his own right, and not as their self-constituted agent. Under such cir-

cumstances, he cannot say that he did not accept the surrender."

"As pointed out in the case cited from California, where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though the tenancy had expired, it amounts to a surrender, and the landlord cannot thereafter recover any rent, or sue for damages."

Willis vs. Kranendonk, 58 Utah 592, 200 Pac. 1025, 18 A. L. R. 947;

Kastner vs. Campbell, 6 Ariz. 145, 53 Pac. 586;

Note: 18 A. L. R. 960.

In Rosenblum vs. Uber, 43 Am. B. R. 480, 256 Fed. 584, cited by appellants, the Pennsylvania statute under which it was decided gave to the landlord priority for one year's rent and the landlord in accepting possession from the trustee expressly did so for the benefit of the estate. As is said in Electric Appliance Company vs. Ellis a decision of the same Court reported in 4 Fed. (2d) 108.

"The parties in the Rosenblum case acted under an agreement, in that the qualified offer of the landlord in taking possession was accepted by the trustee. Here the qualified offer of the landlord was unqualifiedly rejected by the trustee and the subsequent taking of possession and occupation of the premises by the landlord was his own independent act."

IV.

The lien of the lessor created by the statute of Arizona, if effective at all against the Fifteen Hundred Dollars deposited as security, is only to the extent of rentals due and unpaid prior to the lessee's bankruptcy.

Section 1958 of the Revised Code of Arizona, 1928, provides:

> "The landlord shall have a lien on all the property of his tenant not exempt by law, placed upon or used on the leased premises until his rent is paid, such lien, however, shall not secure the payment of rent ensuing after the death or bankruptcy of the lessee * * * ."

It will be observed that the lien given extends only to non-exempt property of the tenant placed upon or used on the leased premises and then only for rent due prior to bankruptcy. Nothing in the statute warrants the conclusion of appellants that any lien is given on the deposit for security, moreover there is no denial on the part of the trustee to the right of appellants to rentals due and unpaid prior to bankruptcy.

CONCLUSION.

The appellee has herein presented the aspects of this appeal from his viewpoint and has endeavored, either directly or indirectly, to answer every point made in appellants' brief. Whatever remains in the way of applying the points and authorities of the appellee to appellants'

contentions and distinguishing the authorities relied upon by them, must be left to the reasoning of the Court with such assistance as appellee may be able to render on oral argument.

In conclusion, the appellee respectfully submits that the provisions of the lease and the surrounding circumstances clearly show that the deposit made by the bankrupt was to insure the faithful performance of the lease; that the lease was terminated on the appellants' entry into possession and leasing to another for their own benefit and that upon such termination the appellee as trustee and successor in interest of the bankrupt became entitled to the deposit. For these reasons the appellee respectfully asks the Court to affirm that portion of the Order appealed from by the appellants.

Respectfully submitted,

WALTER J. THALHEIMER,
Attorney for Appellee.